135-483

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 322.

JOSEPH ANDERSON AND HANNAH M. ANDERSON,
PLAINTIFFS IN ERROR,

vs.

LEVI CARKINS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED APRIL 28, 1887.

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1 Pleas before the supreme court of the State of Nebraska at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 4th day of January, A. D. 1887.

Present: Hon. Samuel Maxwell, chief justice; Hon. M. B. Reese, Hon. Amasa Cobb, judges.

Attest: GUY A. BROWN, *Clerk.*

LEVI CARKINS, Plaintiff in Error,
vs.
JOSEPH ANDERSON & HANNAH M. ANDERSON, Defendants in Error.

Be it remembered that on the 20th day of December, 1886, there were filed in the office of the clerk of said court a certain petition in error, transcript, bill of exceptions, and waiver of process, which were in the words and figures following, to wit:

Petition in Error.

Supreme Court of Nebraska.

LEVI CARKINS, Plaintiff in Error,
vs.
JOSEPH ANDERSON & HANNAH M. ANDERSON, Defendants in Error.

The plaintiff complains of the defendants for that on the 22nd day of July, 1886, the defendants herein recovered a judgment against the plaintiff herein, in the district court of Adams county, Nebraska, dismissing his petition and cause of action and for $24.88, costs of suit, in an action pending in said court wherein this plaintiff was plaintiff and the defendants herein were defendants. A tran-
2 script of the proceedings containing said final judgment is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. That the finding and judgment of the court are contrary to law.

2d. That the finding and judgment of the court are not sustained by the evidence and are contrary to the weight thereof.

3d. That the judgment of the court ought to have been for the plaintiff and against the defendants according to the law and the evidence.

The plaintiff therefore prays that the judgment of the court may be reversed and a decree entered in this court for plaintiff, or, in lieu thereof, that a new trial may be granted.

LEVI CARKINS,
By A. H. BOWEN,
His Attorney.

Be it remembered that on the 10th day of October, A. D. 1885, was filed in the office of the clerk of the district court a certain petition, said petition, with all the endorsements thereon, being in the words and figures *as* following, to wit:

Petition.

In the District Court, Adams County, Nebraska.

LEVI CARKINS, Pl'ff,
vs.
JOSEPH ANDERSON and HANNAH M. ANDERSON, Def'ts.

The plaintiff complains of the defendants for that on the 16th day of December, 1876, said defendants, being the owners of and
3 in possession of the following-described premises, to wit, the south ½ of the southeast ¼ of section 10, in town. 8 north of range 10 west of the 6th principal meridian, situate in Adams county, Nebraska, on said day sold the same to the plaintiff and entered into an agreement in writing, duly signed in relation thereto, with the defendants, a copy of which agreements is hereto attached and made a part of this petition and marked Exhibit "A."

2nd. That on or about the 1st day of January, 1881, and at divers times subsequent thereto plaintiff in a friendly manner requested said defendants to convey said premises to said plaintiff according to the terms of said agreement, but the defendants refused and still does refuse to execute and deliver such conveyance.

EXHIBIT A.

This agreement, made and entered into this 16th day of December, A. D. 1876, by and between Joseph Anderson and Hannah M. Anderson, his wife, of the county of Adams and State of Nebraska, parties of the first part, and Levi Carkins, of Adams county, Nebraska, party to the second part, witness:

That the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to wit:

The south one-half of the southeast quarter of section No. ten (10), in town. 8, range (10) ten west, in Adams county, Nebraska; and the parties of the first part further agree with the party of the second part that they will make and execute to him on or before the 1st day of May, 1881, a good and sufficient warranty deed of said premises, clear of all incumbrances, and for the faithful performance of this contract they bind themselves, their heirs, executors, administrators, and assigns.

4 In witness whereof they have hereunto set their hands and seals this 16th day of December, 1876.

(Signed) JOSEPH ANDERSON,
HANNAH M. ANDERSON,
Parties of the First Part.
LEVI CARKINS,
Party of 2nd Part.

In presence of—
L. P. HAWLEY.

3rd. The plaintiff has performed all of the conditions of said agreement on his part.

The plaintiff therefore prays that said defendants may be required to execute and deliver to him, the said plaintiff, a deed of conveyance of said premises, with covenants of general warranty, and for such other relief as justice and equity may require.

LEVI CARKINS,
By A. H. BOWEN, *His Att'y.*

STATE OF NEBRASKA, } ss:
Adams County, }

Levi Carkins, being sworn, says that he is the plaintiff in the above action; that he has read the foregoing petition and knows the contents thereof, and that the matter and facts stated therein are true, as he verily believes.

LEVI CARKINS.

Sworn to before me and subscribed in my presence this 10 day of October, 1885.

[SEAL.] R. D. BABCOCK,
Notary Public.

5 Endorsed as follows: Levi Carkins *vs.* Joseph Anderson and Hannah M. Anderson. Petition. Filed Oct. 10, 1885. R. B. Tussey, clerk. Benj. Uruhard, dep. A. H. Bowers, for pl'ff.

Afterwards, to wit, on the 19th day of October, A. D. 1885, was filed in the office of the clerk of the district court a certain summons, said summons, with all the endorsements thereon, being in the words and figures following, to wit:

Summons.

STATE OF NEBRASKA, } ss:
Adams County, }

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify Joseph Anderson and Hannah M. Anderson, defendants, that they have been sued by Levi Carkins, plaintiff, in the district court of the 5th judicial district in and for said county of Adams, and that unless they answer by the ninth day of November, A. D. 1885, the petition of said Levi Carkins filed against them in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on or before the 19 day of October, A. D. 1885.

Witness my hand and the seal of said court, at Hastings, this 10th day of October, A. D. 1885.

[SEAL.] R. B. TUSSEY, *Clerk.*

6 Endorsed as follows: Summons. District court, Adams county. Dec. 6. No. 1372. Page 151. Levi Carkins, plaintiff, *vs.* Joseph Anderson *et al.*, defendants. Attest: R. B. Tussey, clerk. Returnable Oct. 19, 1885. A. H. Bowen, plaintiff's attor-

ney. Received Oct. 12, 1885. D. L. Barlass, sheriff. Filed Oct. 19, 1885. R. B. Tussey, clerk.

Sheriff's Return.

THE STATE OF NEBRASKA, } ss:
Adams County, }

I hereby certify that on the 17 day of October, 1885, I served the within writ of summons on the within-named Joseph Anderson by delivering to him a true and certified copy of the same, with all the endorsements thereon.

I hereby certify that on the 17 day of October, 1885, I served the within writ of summons on the within-named Hannah M. Anderson by leaving at her usual place of residence a true and certified copy of the same, with all the endorsements thereon, as required by law.

D. L. BARLASS, *Sheriff.*

Fees, 2.00.

Afterwards, to wit, on the 7th day of November, A. D. 1885, was filed in the office of the clerk of the district court a certain answer, said answer, with all the endorsements thereon, being in the words and figures following, to wit:

Answer of Defendants.

In the District Court of Adams County, Nebraska.

7 LEVI CARKINS, Plaintiff, }
vs.
JOSEPH ANDERSON & HANNA M. ANDERSON, Defendants. }

1st. Come now the defendants, and for answer to the petition of the plaintiff filed herein deny each and every allegation contained in said petition not hereinafter admitted.

2nd. The defendants admit that they made the written contract mentioned in the plaintiff's petition, but allege that neither the defendant, Joseph Anderson or Hanna M. Anderson was the owner of said land mentioned in said contract at the time the same was made, nor was either of them in possession of the same at the time or at any time prior thereto.

The defendants say that at the time of making said contract the land mentioned therein belonged to the General Government of the United States.

That said contract was made in contemplation of the defendant, Joseph Anderson, taking said land as a homestead under and by virtue of the act of Congress granting homesteads upon the public domain to honorably discharged soldiers.

That on the 7th day of March, 1877, the defendant, Joseph Anderson, did enter as a homestead at the United States land office at Bloomington, Nebraska, the southeast quarter of section No. ten,

township No. eight (8) north, of range No. ten (10) west, of the sixth principal meridian, in Adams county, Nebraska, under and by virtue of the aforesaid act of Congress.

That the land described in plaintiff's petition is a part of the above-mentioned land, and he resided upon said land and cultivated the same, as provided by said act of Congress, until the
8 31st day of March, 1884, at which time he made final proof, as required by law, and received what is termed a final receiver's receipt, and that on the — day of ——, 188–, a patent was issued to him by said United States Government for said land, and that he has resided upon said land ever since and does now reside upon the same with his family.

That at the time of making said contract as aforesaid he was entirely ignorant and unacquainted with the laws of the United States governing the taking of land as homesteads, and that the plaintiff, *is* seeking to cheat and defraud these defendants out of their rights, pretended that he had a claim upon the said quarter section of land, and represented that if the defendants would make the aforesaid contract he would convey his pretended right to them, and thereby induced the defendants to make said contract, and that as soon as these defendants learned that said contract was contrary to law they took steps to repudiate said contract and rescind the same and have ever since held said contract as void.

That no consideration was paid for sale of said land by the plaintiff to the defendants or either of them.

The said defendants say that the plaintiff ought not to recover on said contract, because the same was made before the entry of said land by the *plaintiff*, Joseph Anderson, and before the patent was issued therefor, and that the same is void as against public policy.

And 2nd defense. The defendants allege, as a further cause of defense to the plaintiff's petition, that on the 4th day of June, 1884, the plaintiff filed a petition in the district court of Adams county,
9 Nebraska, against these defendants in words and figures following, to wit:

STATE OF NEBRASKA, } ss:
County of Adams, }

In the District Court of the Fifth Judicial District Thereof.

LEVI CARKINS
vs.
JOSEPH ANDERSON & HANNA ANDERSON.

Petition.

The plaintiff complains of the defendants for that on the 16th day of September, 1873, the plaintiff did, at the United States land office at Bloomington, Nebraska, enter, under the timber-culture act of the United States, in accordance with the said act then in existence, the following-described land, to wit:

The southeast quarter (¼) section ten (10), township eight (8) north, of range ten (10) west, in Adams county, Nebraska.

2nd. That on the 16th day of December, 1876, at the town of Juniata, in the county and State aforesaid, plaintiff relinquished unto the Government of the United States for the benefit of said defendant, Joseph Anderson, all his, plaintiff's, right, title and interest in and to the above-described land by virtue of his, plaintiff's, right and title under said timber-culture entry.

3rd. That said relinquishment made as aforesaid was upon the following conditions, to wit:

The improvements upon said land, placed thereon by the plaintiff herein, which consisted of forty acres of breaking, which
10 breaking was valued by the parties herein at the value of one hundred dollars, *was* to be turned over by the plaintiff to the use, ownership, and benefit of the defendant, Joseph Anderson, as hereinafter plead, and also eighty acres of said tract — land, to wit, the south half of said quarter section, was to be turned over by the plaintiff to the use and benefit and ownership of the said defendant, as hereinafter plead; that said agreement and understanding was verbal.

4th. That said relinquishment made as aforesaid was upon the further condition, to wit:

That upon the cancellation of plaintiff's timber-culture entry, by virtue of said relinquishment, the defendant, Joseph Anderson, should enter the said quarter section as a homestead entry under the homestead act of the United States in his own name; should complete his residence, occupation, and cultivation upon said tract in conformity to the homestead laws of the United States in all respects thereunder.

And it was further expressly agreed and understood by and between the plaintiff and the defendant herein that the said defendant should, by virtue of his residence, occupation, and cultivation thereof, and by virtue of the use of time allowed upon his residence upon said tract by reason of said defendant having been a soldier in the United States Federal Army, *should* on or before the first day of May, 1881, make a final proof upon said quarter section of land under said homestead — of the United States; and thereupon, to wit, on or before the first day of May, 1881, the said defendant was to make, execute, and deliver up to the plaintiff herein a good and sufficient warranty deed of and to the south one-half (½) of southeast quarter (¼) of section ten (10), town. eight (8),
11 range ten (10) west, the same being eighty acres of the quarter section hereinbefore described, which agreement and unstanding was verbal.

And, upon the consideration hereinbefore expressed for the due and faithful performance of which agreement on the part of the defendant to and with the plaintiff herein, the said defendants, Joseph Anderson and Hanna M. Anderson, did, on the 16th day of December, 1876, make, execute, and deliver to the said plaintiff a certain written instrument in words and figures following, to wit:

Joseph Anderson & wife to Levi Carkins.

This agreement, made and entered — this 16 day of December, 1876, by and between Joseph Anderson and Hanna M. Anderson, his wife, of the county of Adams and State of Nebraska, parties of the first part, and Levi Carkins, of Adams county, party of the second part, witnesseth:

That the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to wit:

The south one-half of the southwest quarter of section No. ten (10), in town. 8, range ten (10) west, in Adams county, Nebraska; and the parties of the first part further agree with the party of the second part that they will make and execute to him on or before the 1st day of May, 1881, a good and sufficient warranty deed of said premises, clear of all incumbrances, and for the faithful performance of this contract they hereby bind themselves, their heirs, executors, administrators, and assigns.

In witness whereof they have hereunto set their hands and
12 seals this 16th day of December, 1876.

JOSEPH ANDERSON,
HANNA M. ANDERSON,
Parties of the First Part.
LEVI CARKINS,
Party of the 2nd Part.

In presence of—
L. P. HAWLEY.

Said instrument was duly filed for record in the county clerk's office of Adams county, in Book 2, page —, Miscellaneous Records, on the 24 day of October, 1881, at 3 p. m.

5th. That on the 15 day of September, 1876, at the United States land office at Bloomington, Nebraska, the cancellation of said timber-culture entry was duly entered and made upon the records of said office in pursuance of said agreement and relinquishment as hereinbefore stated.

6th. That afterwards, to wit, on the 7th day of March, 1877, said defendant, Joseph Anderson, at the United States land office at Bloomington, Nebr., entered said quarter section of land as a homestead entry, the number thereof being 3904, said entry being made in pursuance of the agreement as hereinbefore plead.

7th. That since the said 7th day of March, 1877, the said Joseph Anderson, defendant, has resided upon, cultivated, and improved said quarter section of land under and by virtue of said homestead entry and — all respects conformed to the homestead laws in reference thereto.

8th. That said defendant did, on the 31st day of March, 1884, make final proof upon said quarter section under and by
13 virtue of the homestead laws of the United States.

9th. That on the 31 day of March, 1884, the said final proof

was duly approved by the register and receiver of the United States land office at Bloomington, Nebr., and final receiver's receipt was issued by the receiver of said land office to said Joseph Anderson, defendant herein, No. 8432, dated March 31, 1884.

10th. That on the 1st day of May, 1881, and at sundry and divers other times prior and subsequent thereto the plaintiff requested the defendants to convey said premises, to wit, the south half of said quarter section of land, to plaintiff according to the terms of said agreement, but the defendants refused and still refuse to execute and deliver such conveyance for said premises.

Plaintiff further says that the defendants threaten to and *is* about to and will, unless restrained by this court, dispose of said above-described entire quarter section of land, to the great and irreparable damage of the said plaintiff.

The plaintiff therefore prays that the said defendants be restrained and enjoined by order of this court from selling, disposing of, incumbering, using, occupying, or in any manner interfering with the south half of said quarter section of land during the pendency of this action.

The plaintiff further prays that said defendants be required to perform their said agreement, and that said defendants by decree of this court be ordered to make, execute, and deliver to the said plaintiff a good and sufficient warranty deed to the south half of the southwest quarter of section ten, town. eight, range ten west, in Adams county, Nebraska, and for such other and further relief as equity and justice may require.

LEVI CARKINS,
14 By TANNER & CAPPS,
His Attorney.

STATE OF NEBRASKA, } *ss:*
County of Adams, }

Levi Carkins upon oath says that the facts stated in the foregoing petition are true.

LEVI CARKINS.

Subscribed in my presence and sworn to before me this 24 day of March, 1884.

R. B. TUSSEY,
Clerk D. C.

That on, to wit, the 4th day of June, 1884, the defendants filed to the foregoing petition a general demurrer in words and figures following, to wit:

In the District Court of Adams County, Nebraska.

LEVI CARKINS, Plaintiff,
vs.
JOSEPH ANDERSON and HANNA M. ANDERSON, Defendants.

Demurrer.

Come now the defendants and demur to the petition of the plain-

tiff and to each and every count thereof for the reason that said petition does not state facts sufficient to constitute a cause of action.

BATTY & RAGAN,
Att'ys for Defendants.

Said cause coming on to be heard *to* the court upon said demurrer the court, rendered the following judgment, to wit:

LEVI CARKINS
vs.
JOSEPH ANDERSON.

15 Now, this day, this cause comes on for hearing upon the demurrer of the defendant to the petition of the plaintiff, and the court, upon consideration thereof, doth sustain said demurrer, and this cause is dismissed at the costs of the plaintiff, taxed at $—.
Nov. 13th, 1884.

That said judgment now stands in full force and effect unappealed from.

The defendants aver that the above-mentioned action was between the same parties and upon the same contract, and the plaintiff prayed for the same relief as in this case, and that said demurrer went to the merits of the case and was a full adjudication upon the merits of said case, and on account thereof the plaintiff is estopped from maintaining this action.

Therefore the defendants pray that this cause may be dismissed at the costs of the plaintiff, and for such other and further relief as may be just and equitable.

BATTY & CASTO,
Attorneys for Defendants.

STATE OF NEBRASKA, } ss:
County of Adams, }

Joseph Anderson, being duly sworn according to law, upon his oath deposeth and saith that he is one of the defendants in the above-entitled cause; that he has read the above answer and knows its contents, and that the facts therein contained are true, as he verily believes; and further he saith not.

JOSEPH ANDERSON.

16 Subscribed in my presence and sworn to before me this 7th day of November, A. D. 1885.

R. B. TUSSEY, *Clerk.*
[SEAL.] B. G. URGUHART, *Deputy.*

Endorsed: 1372, 6, 151. Levi Carkins, plaintiff, *vs.* Joseph Anderson, Hanna M. Anderson, defendants. Answer of the defendants. Filed Nov. 7, 1885. R. B. Tussey, clerk. Benj. Uguhart, dep. Batty & Casto, att'ys for def'ts.

Afterwards, to wit, on the 16th day of November, A. D. 1885, was filed in the office of the clerk of the district court a certain motion

to separate and number different defenses, said motion, with all the endorsements thereon, being in the words and figures following, to wit:

Motion.

In the District Court, Adams County, Nebraska.

LEVI CARKINS
vs.
JOSEPH ANDERSON and HANNAH M. ANDERSON.

Motion to separate and number different defenses.

Comes now plaintiff and moves the court here to require
17 defendant to separately state and number his different causes of defense stated in the 2nd paragraph of his answer filed herein.

LEVI CARKINS,
By A. H. BOWEN, *His Att'y.*

Endorsed: Levi Carkins *vs.* Joseph Anderson *et al.* Motion to separate & number defenses in answer. Filed Nov. 16, 1885. R. R. Tussey, clerk D. C. A. H. Bowen, for pl'ff.

Journal Entry.

Be it remembered that on Monday, the 16th day of November, A. D. 1885, was begun and held at the usual place of holding court, in the city of Hastings, a regular term of the district court of the fifth judicial district in and for Adams county, in the State of Nebraska, pursuant to a written order of said court heretofore made and entered of record.

Present: Hon. Wm. H. Morris, sole presiding judge; D. L. Barlass, sheriff; S. A. Searle, reporter; R. B. Tussey, clerk.

Court being duly called by the sheriff, the following proceedings were had and done, to wit:

Afterwards, to wit, on the 21st day of November, A. D. 1885, being one of the days of the regular November term of said court, the following proceedings were had and done, to wit:

Court met pursuant to adjournment of yesterday.

Present: Hon. Wm. H. Morris, sole presiding judge; D.
18 L. Barlass, sheriff; S. A. Searle, reporter; R. B. Tussey, clerk.

Court being duly opened, the following proceedings, among others, were had and done, to wit:

LEVI CARKINS
vs.
JOSEPH ANDERSON. } 1372, 6, 151.

Now, on this day, this cause comes on for hearing upon the demurrer of the plaintiff to the defendant's answer, and the court, upon consideration thereof, sustains said demurrer; to which ruling of the court the defendant excepts.

Whereupon court adjourned until Monday at 1 o'clock p. m.
Journal read, approved, and signed in open court.

—— ——, *Judge.*

Court Journal No. 4, page 315.

Afterwards, to wit, on the 23rd day of November, A. D. 1885, was filed in the office of the clerk of the district court a certain demurrer, said demurrer, with all the endorsements thereon, being in the words and figures following, to wit:

Demurrer.

In the District Court of Adams County, Nebraska.

LEVI CARKINS, Pl'ff,
vs.
JOSEPH ANDERSON & HANNAH M. ANDERSON, Def'ts.

Demurrer to answer.

Comes now the plaintiff and demurs to the 1st, 2nd, and last part of the 3rd paragraph of count No. 2, marked and numbered,
19 and to each of said paragraphs for the reason that said paragraphs nor either of them state facts sufficient to constitute a cause of defense to plaintiff's petition.

And plaintiff, further demurring to the last count in said answer, marked therein as "2nd defense," states that the facts stated in said count does not state facts sufficient to constitute a defense to said plaintiff's petition.

A. H. BOWEN,
Att'y for Pl'ff.

Endorsed as follows: 1372, 6, 151. Levi Carkins *vs.* Joseph Anderson *et al.* Demurrer. Filed Nov. 23, 1885. R. B. Tussey, clerk D. C. A. H. Bowen, att'y for pl'ff.

Afterwards, to wit, on the 16th day of December, A. D. 1885, was filed in the office of the clerk of the district court a certain reply, said reply, with all the endorsements thereon, being in the words and figures following, to wit:

Reply.

In the District Court of Adams County, Nebraska.

LEVI CARKINS
vs.
JOSEPH ANDERSON and HANNAH M. ANDERSON.

Comes now the plaintiff, and, for reply to the answer of the defendants herein, denies that the contract sued upon herein was without consideration to said defendants, but alleges the fact to be that said

contract was made for a valuable consideration, to wit, property of this plaintiff of the value of one hundred dollars delivered by said plaintiff to said defendants and received by them and still retained by them, the said defendants.

Wherefore plaintiff prays judgment.

A. H. BOWEN,
Att'y for Pl'ff.

STATE OF NEBRASKA, }
Adams County, } *ss:*

Levi Carkins, being sworn, says that he is the plaintiff herein; that he has read the above reply, and that the matters and facts stated therein are true, as he believes.

—— ——.

Sworn to before me and subscribed in my presence this 28 day of November, 1885.

—— ——,
Notary Public.

Endorsed as follows: 1372, 6, 151. Levi Carkins *vs.* Joseph Anderson *et al.* Reply. Filed Dec. 16, 1885. R. B. Tussey, clerk. Benj. Urquhart, dep. A. H. Bowen, for pl'ff.

Journal Entry.

Be it remembered that on Tuesday, the 3 day of June, A. D. 1886, was begun and held at the usual place of holding court, in the city of Hastings, a regular term of the district court of the fifth judicial district of Nebraska in and for the county of Adams, in said State, pursuant to a written order of said court heretofore made and entered of record.

Present, the following-named officers of said court, to wit: Hon. Wm. H. Morris, sole presiding judge; David L. Barlass,
21 sheriff; Manford Savage, district attorney; S. A. Searle, reporter; R. B. Tussey, clerk.

Court being regularly opened by the sheriff, the following proceedings were had and done, to wit:

Afterwards, to wit, on the 16th day of June, A. D. 1886, being one of the days of the regular June term of said court, the following proceedings were had and done, to wit:

Court met pursuant to adjournment of Saturday, June 12, 1886.

Present: Hon. Wm. H. Morris, sole presiding judge; D. L. Barlass, sheriff; S. A. Searle, reporter; R. B. Tussey, clerk.

Court being regularly opened, the following proceedings were had and done, to wit:

LEVI CARKINS
vs.
JOSEPH ANDERSON *et al.* } 1372, 6, 151.

This day this cause was tried *to* the court and submitted.
Whereupon court adjourned until to-morrow morning at 9 o'clock.

Journal read, approved, and signed in open court.

—— ——, *Judge.*

Court Journal No. 4, page 427.

Journal Entry.

Adjourned June Term, to wit, July 22, 1886.

Court met pursuant to adjournment of Saturday, June 19, 1886.

22 Present: Hon. Wm. H. Morris, sole presiding judge; Hon. D. L. Barlass, sheriff; Hon. R. B. Tussey, clerk; Hon. Benj. Erguhart, deputy clerk.

Court being regularly opened, the following proceedings were had and done, to wit:

LEVI CARKINS
vs.
JOSEPH ANDERSON *et al.* } 1372, 6, 151.

Now, on this day, this cause comes on for hearing and trial before the court without the intervention of a jury, and the court, after hearing the evidence introduced in open court and listening to the arguments of counsel and being fully advised in the premises, doth find for the defendant and against the plaintiff.

In pursuance of said finding it is by the court ordered and adjudged that the defendant go hence without day, and that he have and recover of and from the said plaintiff his costs herein, taxed at $24.88, and leave is hereby given plaintiff 40 days to prepare and present bill of exceptions.

Whereupon court adjourned until to-morrow morning at 9 o'clock.

Journal read, approved, and signed in open court.

—— ——, *Judge.*

Court Journal No. 4, page 468.

Bill of Exceptions.

Afterwards, to wit, on the 30 day of September, A. D. 1886,
23 was filed in the office of the clerk of the district court a certain bill of exceptions, said bill of exceptions, with all the endorsements thereon, being in the words and figures following, to wit:

STATE OF NEBRASKA, }
Adams County. }

It appearing that the annexed and foregoing is all the evidence given or offered to be given in the trial of the within-entitled cause, upon application of the plaintiff, by his attorney, A. H. Bowen, this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

Done at my office, in Hastings, this 30th day of September, A. D. 1886.

R. B. TUSSEY, *Clerk.*
BENJ. UGUHART, *Dep.*

[SEAL.]

Filed Sept. 30, 1886.

R. B. TUSSEY, *Clerk D. C.*
BENJ. URGUHART, *Deputy.*

In the District Court of the Fifth Judicial District, Held within and for the County of Adams and State of Nebraska.

LEVI CARKINS, Plaintiff, }
vs. }
JOSEPH ANDERSON *et al.*, Defendants. }

Be it known and remembered that on the trial of the above-entitled action, wherein Levi Carkins was plaintiff and Joseph Anderson *et al.* were defendants, trial whereof was had at the June term of said district court, began and held within and for the county of Adams and State of Nebraska for the year 1886, to wit, on the 16th day of June, A. D. 1886, the following testimony and
24 evidence was introduced and given to the court by the plaintiff and in his behalf and by the defendants and in their behalf to maintain the issues by them therein heretofore respectively joined, together with the objections of said parties by them respectively interposed to the introduction of the same, the rulings of the court thereon, and the exceptions of said parties by them respectively thereto noted, as hereinafter written and set forth, as follows, to wit:

Present: The plaintiff with his attorney, A. H. Bowen, Esq.; also the defendants with their attorneys, Messrs. Batty & Casto.

LEVI CARKINS, the plaintiff, being called in his own behalf and duly sworn, questioned by Mr. BOWEN, testified as follows, to wit:

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. State what consideration passed between you and the defendant on the contract upon which you sue.

A. The consideration was one thousand dollars. This consists of one hundred and sixty acres of land that I held as a tree claim from 1873 till the time this contract was made, forty acres of it cultivated land and twenty acres of timber planted on it.

Q. You may state what conversation you had with the defendant as to fixing the price as to what it was considered to be worth at the time.

A. This was about the amount of it: He wanted to buy the land.

Q. What price did you fix upon the land to him?

A. We fixed $1,000.00.

Q. Both of you agreed that it was worth $1,000.00?

25 A. Yes; and I was satisfied that he would have paid me the thousand dollars if he had the money.

Q. The improvements that you had on that land you estimated to be worth one thousand dollars, together with your relinquishment?

A. Yes, sir.

JACOB BARBE, being called by the plaintiff and duly sworn, questioned by Mr. BOWEN, testified as follows, to wit:

Q. Where do you live?

A. In Hall county, Nebraska.

Q. Are you acquainted with the parties to this case, Levi Carkins and Joseph Anderson and Mrs. Anderson?

A. Yes, sir.

Q. How long have you known them?

A. About eleven years.

Q. Were you acquainted with the land in controversy in the summer of 1876?

A. Not in 1876; in 1874 and 1875.

Q. You knew it during that time, did you?

A. Yes, sir.

Q. Do you know what improvements were on that land?

A. In 1874, I believe, he broke forty acres—Mr. Carkins did. In 1875 I helped him to put out cuttings there, and he paid me for it.

Q. Have you had any conversation with the defendant Anderson relative to the purchase of Mr. Carkins' improvements on that piece of land at any time since that transaction?

26 A. There was a little since he has the care of the quarter — of land—since he made the bargain with Mr. Carkins about the land.

Q. State what, if anything, Mr. Anderson said about the improvements as determined between him and Mr. Carkins.

A. There was but little said. I saw him—I forget just how it came up. I says, How is it?

Q. Where was Mr. Anderson at that time?

A. He was on the land in controversy. I says, Have you bought that land? No, says he, I didn't buy it; I homesteaded it. I says, How is that? He says, It is a homestead, and Mr. Carkins and I compromised that matter, so that I homesteaded it. I says, How is that? and he says, At the end of five years he is to take the south eighty, when I prove up, and I am to keep the north. That is the conversation, as I remember it.

The plaintiff rests his case.

JOSEPH ANDERSON, one of the defendants, being called in his own behalf and duly sworn, questioned by Mr. BATTY, testified as follows, to wit:

Q. Are you one of the defendants in this case?
A. Yes, sir.
Q. State to the court if you made the contract set out in the plaintiff's petition.
A. Yes, sir; I did.
Q. State to the court if, at the time that contract was made, you was the owner of the land described in that contract.

The plaintiff objects to the question for the reason that it is
27 immaterial, irrelevant, and incompetent and already admitted by the pleadings; which objection is overruled by the court and the plaintiff's exception noted to the ruling of the court.

A. No, sir.
Q. Who was the owner of it?
A. The U. S. Government, I suppose.
Q. At the time of making this contract had you then filed a homestead entry on this land?

The plaintiff objects to the question for the reason that it is incompetent under the pleadings; which objection is sustained by the court and the defendant's exception noted to the ruling of the court.

Q. At the time of making this contract what consideration passed from Carkins to you, if any—what did you get? In that contract you agreed to deed him eighty acres of land when you proved up on it. What did he give you for that, if anything?
A. Nothing.
Q. You never received a dollar for it?
A. I never received one cent.
Q. The contract says in consideration of one hundred dollars. Did you get that hundred dollars or any part of it?
A. No, sir.

Cross-examination by Mr. BOWEN:

Q. You say you didn't receive any consideration?
A. No, sir.
Q. Mr. Carkins had a timber-claim filing on it?
A. Yes, sir.
Q. He surrendered it to the Government for you to get a
28 homestead filing on it?
A. Yes, sir.
Q. He had forty acres of cultivated land on there, didn't he?
A. There was forty acres broke on it.
Q. You got your homestead on that land?
A. Yes, sir.
Q. Whatever improvements there was you got the benefit of, didn't you?

The defendant objects to the question for the reason that it is immaterial; which objection is overruled by the court and the defendant's exception noted to the ruling of the court.

A. Of course; I have worked the land ever since.
Q. You hold it now?
A. Yes, sir.

Mrs. HANNAH ANDERSON, being called for the defendants and duly sworn, questioned by Mr. BATTY, testified as follows, to wit:

Q. Are you one of the defendants in this case?
A. Yes, sir.
Q. Did you ever receive any consideration for this agreement to convey this eighty acres of land mentioned in this petition?
A. No, sir; not even his wash bill; that I did for him for two years.

The parties rest their case.

THE STATE OF NEBRASKA, } ss:
Fifth Judicial District, }

29 I hereby certify that the above and foregoing is a true and correct copy, record, and transcript of all the testimony and evidence introduced and offered to the court on the trial of the above-entitled action, wherein Levi Carkins was plaintiff and Joseph Anderson *et al.* were defendants, trial whereof was had at the June term of said district court for the year 1886, to wit, on the 16th day of June, A. D. 1886, in the county of Adams and State of Nebraska, by the plaintiff and in his behalf and also by the defendants and in their behalf to maintain the issues heretofore joined by and between said parties in said cause, together with the objections to the introduction of the same, the rulings of the court thereon, and the exceptions of said parties by them respectively thereto noted, as hereinbefore written and set forth.

In witness whereof I have hereunto set my hand, in said district, this 31st day of August, A. D. 1886.

S. A. SEARLE,
Court Reporter, 5th Dist.

Received this bill of exceptions this 1st day of September, 1886, for examination.

BATTY & CASTO,
Att'ys for Def'ts.

We herewith return this bill of exceptions to the attorneys of the plaintiff this 25th day of September, 1886.

BATTY & CASTO,
Attorneys for Def'ts.

STATE OF NEBRASKA, } ss:
Adams County, }

It is hereby stipulated and agreed by and between the parties hereto that the within and foregoing bill of exceptions contains all

of the testimony given or offered upon the trial of said
30 action, and that the clerk of the district court of said county shall settle and sign the same, pursuant to the provisions of section 311 of the Code of Civil Procedure.

LEVI CARKINS,
By A. H. BOWEN,
His Attorney.
BATTY & CASTO,
Attorneys for Def'ts.

STATE OF NEBRASKA, } ss:
Adams County, }

I, R. B. Tussey, clerk of the district court in and for said county and State, do hereby certify that the foregoing transcript, numbered page 1 to page 33, inclusive, contains a full, true, and correct copy of all pleadings on file and all orders of the court made during the pendency of a certain cause in said court, wherein Levi Carkins was plaintiff and Joseph Anderson and Hannah M. Anderson were defendants, as the same now appears on file and of record in my office.

I further certify that the bill of exceptions hereto annexed and made a part of this transcript is the original bill of exceptions settled and allowed by me in said cause.

In testimony whereof I have hereunto set my hand and the seal of said court, at Hastings, this 29th day of September, 1886.

R. B. TUSSEY, *Clerk,*
[SEAL.] By BENJ. URGUHART, *Deputy.*

Fees, $7.00.

Waiver of Process.

STATE OF NEBRASKA, } ss:
31 *Adams County,* }

We hereby waive the issuance and service of summons in error in the within case.

BATTY & CASTO,
Att'ys for Def'ts in Error.

October 6, 1886.

Endorsed: 2696. Transcript, Levi Carkins *vs.* Joseph Anderson *et al.*, from district court of Adams county, Nebr. Supreme court of Nebraska. Filed December 20th, 1886. Guy A. Brown, clerk. A. H. Bowen, att'y for pl'ff.

And afterwards, to wit, on the 24th day of February, 1887, there was filed in the office of the clerk of the supreme court of Nebraska a certain stipulation in the words and figures following, to wit:

Supreme Court, State of Nebraska.

LEVI CARKINS
vs.
JOSEPH ANDERSON *et al.* } No. 2337.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that said action be dismissed at the cost of plaintiff, said defendant stipulating and agreeing to, and does hereby, waive the question of former adjudication in a case of like title now pending in this court, general number 2696, term No. 306, but that said action shall be heard without reference to its former trial in court below.

A. H. BOWEN,
For Plaintiff.
R. A. BATTY,
Att'y for Defendant.

32 Endorsed: 159, 2387, also 2696. Levi Carkins *vs.* Joseph Anderson *et al.* Stipulation for dismissal. Filed Feb'y 24, 1887. Guy A. Brown, clerk. A. H. Bowen, for pl'ff.

And afterwards, to wit, on the 1st day of March, 1887, the following order was made by said court and entered of record, to wit:

LEVI CARKINS
vs.
JOSEPH ANDERSON and HANNAH M. ANDERSON. } Error from Adams County. No. 2696. Decree.

This cause came on to be heard — was taken up and argued by counsel; in consideration whereof the court finds there is error apparent upon the record in said proceedings and judgment and upon the issues joined in favor of plaintiff. It is therefore considered by the court that the judgment of the district court should be, and is hereby, reversed. It is further considered by the court that the defendants, Joseph Anderson and Hannah M. Anderson, within twenty days from this date, execute a good and sufficient deed of the premises in dispute, to wit, the south half of the southeast quarter of section ten, town. eight, range ten west, of the 6th principal meridian, situated in Adams county, Nebraska, and deliver the same to said plaintiff, Levi Carkins, and in default of the execution and delivery of said deed by said defendants within the time limited aforesaid, then this decree to operate as such conveyance, and that the defendants pay the costs of this action, taxed at $—.

33 And afterwards, to wit, on the 1st day of March, 1887, there was filed in the office of the clerk of said court a certain opinion in the words and figures following, to wit:

LEVI CARKINS
vs.
JOSEPH ANDERSON and HANNAH M. ANDERSON.

MAXWELL, *Ch. J.:*

In October, 1885, the plaintiff filed a petition in the court below, stating that on December 16, 1876, defendants, owning and being in possession of the south half of the southeast quarter of section 10, town. 8, range 10, did on said day sell same to plaintiff, and entered into an agreement in writing of that date whereby, in consideration of one hundred dollars paid by plaintiff to defendants, said defendants sold said tract of land to plaintiff, and therein agreed to execute and deliver to plaintiff on or before May 1st, 1881, a good and sufficient warranty deed to said premises, clear of all incumbrances, binding themselves, their heirs, executors, administrators, and assigns.

That plaintiff had performed all conditions on his part; that he has frequently demanded of the defendants the fulfillment of said contract and the execution of said deed of conveyance, which they have ever and still refuse to make. Plaintiff prays for a decree requiring specific performance and for such other relief as he may be entitled to.

The following is the contract upon which the action is brought:

"This agreement, made and entered into this 16th day of December, by and between Joseph Anderson and Hannah Ander-
34 son, his wife, of the county of Adams and State of Nebraska, parties of the first part, and Levi Carkins, of Adams county, Nebraska, party of the second part, witnesseth:

That the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to wit: The south one-half of southeast quarter of section ten (10), in town. eight (8), range ten (10) west, in Adams county, Nebraska.

And the parties of the first part further agree with the party of the second part that they will make and execute to him on or before the 1st day of May, 1881, a good and sufficient warranty deed of said premises, clear of all incumbrance, and for the faithful performance of this contract they hereby bind themselves, their heirs, executors, administrators, and assigns.

In witness whereof they have hereunto set their hands and seals this 16th day of December, 1876.

(Signed) JOSEPH ANDERSON,
HANNAH M. ANDERSON,
Parties of the First Part.
LEVI CARKINS,
Party of the Second Part.

In presence of—
L. P. HAWLEY."

The defendants filed an answer as follows:

Denying that when contract was made that they were owners or in possession of said tract of land, and alleging that when contract was made the land belonged to General Government; that
35 contract was made to homestead tract under acts of Congress. In March, 1877, Joseph Anderson, defendant, entered tract with other land as a homestead, and resided on and cultivated land until March 31, 1884, when he made final proof at land office, and subsequently received patent for tract; that when he made contract he was ignorant and unacquainted with law governing homestead; that plaintiff, seeking to cheat and defraud defendants out of their rights, pretended that he had a claim on land, and represented that if defendants would make contract he would convey his right to them. Defendants *was* thereby induced to make contract; that as soon as defendants learned contract was contrary to law they repudiated the same, and have ever since treated same as null and void; that no consideration was paid for sale of land; that contract is void as against public policy.

Plaintiff filed his reply, denying that said contract was without consideration, and alleging that the consideration was valuable, to wit, the transfer by plaintiff of property to defendants, which was received by defendants, and is still retained by them; that such property was worth more than $100.00.

There was a trial *to* the court, and judgment was rendered against the plaintiff, dismissing the action.

The testimony shows that in 1874 the plaintiff was possessed of a timber claim of 160 acres on the Government land, and had broken up 40 acres of said land; that in 1875 he set out about 20 acres of timber thereon; that in 1876 the plaintiff sold the claim in controversy to the defendant Anderson, who was to enter the same as a homestead under the laws of the United States, and who, after making final proof, was to convey one-half of said land to the plaintiff.

36 Chapter 38 of the Comp. Statutes of Nebraska provides that "all contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion, or circumvention for sale, purchase, or payment of improvements made on the lands owned by the Government of the United States shall be deemed valid in law or equity, and may be sued for and recovered as in other contracts."

SEC. 2. "All deeds of quitclaim or other conveyance of all improvements upon public lands shall be as binding and as effectual in law and equity between the parties for conveying of the title of the grantor in and to the same as in cases when the grantor has the fee simple to the premises."

This statute was in force when this contract was made and authorized recovery for improvements on the public lands. The defendants now refuse to execute the contract upon the ground that it is against public policy, and therefore void.

This question was before this court in Simmons *v.* Yuran, 11 Neb., 518; Bateman *v.* Robinson, 13 Neb., 511.

In this case there was reargument ordered and the authorities fully examined and cited, and it was held in substance that where acts are merely prohibited by statute and the parties are not *in pari delicto* the party upon whom no penalty is imposed may upon non-performance enforce his contract against his co-contrator. Jaques *v.* Golightly, 2 Wm. Blacks., 1073; Browning *v.* Morris, 2 Cowp., 790; Williams *v.* Hedley, 8 East., 378; Inhabitants of Worcester *v.* Eaton, 11 Mass., 368; White *v.* Franklin Bank, 22 Pick., 181; Lowell *v.* Boston & Lowell R. R. Co., 23 Pick., 24; Schermerhorn *v.* Talman, 14 N. Y., 93; Blanchard *v.* Jamison, 14 Neb., 246.

37 This principle is recognized by the Supreme Court of the United States, and it has been held in a number of cases that when an illegal contract is completed and money or property has been received by a joint owner by force of the illegal contract he will not be permitted to retain the whole by setting up the illegality of the transaction by which he procured it, but must account to his associates. McBlair *v.* Gibbs, 17 Howard, 237; Brooks *v.* Martin, 2 Wall., 70, and cases cited; Wann *v.* Kelley, 2 McCrary, 628; Planters' Bank *v.* Union Bank, 16 Wall., 483.

In this case the timber claim and improvements are shown by the testimony to have been worth about one thousand dollars. This the defendant obtained under his promise to convey one-half of the land to plaintiff. The defendant's title to the land is the result of the entire transaction, and he cannot be permitted to retain the entire results upon the sole grounds that the means by which he obtained the same was unlawful. The case of Dawson *v.* Merille, 2 Neb., 119, is the only case cited by the defendant in support of his claim, and that case was practically overruled in Simmons *v.* Yuran, 11 Neb., 518; Bateman *v.* Robinson, 12 Neb., 511, and Blanchard *v.* Jamison, 14 Neb., 246.

We hold, therefore, that the plaintiff is entitled to the performance of the contract. The judgment of the district court is reversed, and a decree of specific performance will be entered in this court.

Decree accordingly.

The other judges concur.

And afterwards, to wit, on the 29th day of March, 1887, there was filed in the office of the clerk of said court a certain peti-

38 tion for a writ of error to the United States Supreme Court in the words and figures following, to wit:

In the Supreme Court of the State of Nebraska.

LEVI CARKINS
vs.
JOSEPH ANDERSON and HANNAH M. ANDERSON.

To the Honorable Samuel Maxwell, chief justice of the supreme court of Nebraska:

The petition of Joseph Anderson and Hannah M. Anderson, de-

fendants in the above-entitled action, respectfully shows to your honor—

1. That this action was brought in the district court for Adams county by the plaintiff, Levi Carkins, against your petitioners to compel the specific performance of a contract between the parties whereby your petitioners agreed, on or before May 1st, 1881, to convey by warranty deed to the plaintiff the south half of the south-east quarter of section ten, in township eight, range ten west, in said county.

2. Your petitioners answered the petition filed in said action, and among other things alleged that at the time of the making of said contract the said lands were public lands of the United States, and said contract was entered into by the parties in contemplation of your petitioner, Joseph Anderson, acquiring title thereto under and by virtue of the acts of Congress granting homesteads upon the public domain to honorably discharged soldiers; that on the 7th day of March, 1877, he entered said land as a homestead at the
39 proper United States land office by virtue of said acts; that on the 31st of March, 1884, he made final proof, as required thereby, and a patent has issued to him, and thereupon he claimed that the said contract was in conflict with said act and against the policy thereof, and therefore void.

3. Upon the trial of said action the said district court held that the contract so as aforesaid by the said plaintiff pleaded in his said petition was void as against the provisions of the said homestead law, and upon that ground dismissed the said petition. Whereupon the said plaintiff removed the said action to the supreme court of the State of Nebraska, where the same was argued before the honorable the judges of the said court, who thereupon took the same under consideration, and on the 1st day of March last past the said judges delivered their opinion to the effect that notwithstanding the said act of Congress the said contract was legal and ought to be carried into execution, and held and determined that the judgment of the said district court be reversed, and that a decree be entered according to the prayer of the said petition, whereby a question has arisen between the parties to the said action upon the right of the said defendants to plead and have the protection as against the claim of the said plaintiff of the provision of the aforesaid homestead law, and a judgment of the supreme court of the State of Nebraska has been rendered against the said right.

Wherefore your petitioners pray that your honor will allow a writ of error from the Supreme Court of the United States to the supreme court of the State of Nebraska and the judges thereof, to the end that the record in the said action may be removed into the said Supreme Court of the United States, and that the error
40 complained of by the said defendants may be examined and corrected.

And your petitioners will ever pray, etc.

J. M. WOOLWORTH,
Att'y for Defendants.

Endorsed: 306. Supreme court, State of Nebraska. 2696. Levi Carkins *vs.* Joseph Anderson *et ux.* Petition for a writ of error to U. S. Supreme Court. Filed March 29, 1887. Guy A. Brown, clerk.

And afterwards, to wit, on the 29th day of March, 1887, the following judgment was made by said court and entered of record, to wit:

LEVI CARKINS *v.* JOSEPH ANDERSON *et al.* } No. 2696. Error from the District Court for Adams County.

This cause came on to be heard upon a petition by defendants for the allowance of a writ of error from the Supreme Court of the United States and was submitted to the court; on consideration whereof it is considered by the court that the said motion should be, and it hereby is, overruled.

41 And afterwards, to wit, on the 19th day of April, 1887, there was filed in the office of the clerk of said supreme court a certain bond in the words and figures following, to wit:

Know all men by these presents that we, Joseph Anderson, R. A. Batty, & William Kerr, are held and firmly bound unto Levi Carkins in the full and just sum of five hundred dollars, to be paid to the said Levi Carkins, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a supreme court of the State of Nebraska, in a suit depending in said court between Levi Carkins, plaintiff, and Joseph Anderson & Hannah M. Anderson, defendants, judgment was rendered against the said Joseph Anderson and Hannah M. Anderson, defendants; and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Levi Carkins, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph Anderson & Hannah M. Anderson shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

R. A. BATTY.
WM. KERR.

42 Approved by—
SAM. F. MILLER.

(Endorsed:) No. 2696. Supreme court of Nebraska. Levi Carkins *vs.* Joseph Anderson *et al.* Bond. Filed April 19, 1887. Guy A. Brown, clerk.

43 STATE OF NEBRASKA, *ss:*

I, Guy A. Brown, clerk of the supreme court, do hereby certify that the above and foregoing is a full and complete transcript of the record and proceedings in an action lately pending in said court, wherein Levi Carkins was plaintiff and Joseph Anderson *et ux.* were defendants, as the same appear of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court this 20th day of April, A. D. 1887.

[SEAL.] GUY A. BROWN,
Clerk Supreme Court.

Fees, $12.50, paid by R. A. Batty.

44 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Levi Carkins, plaintiff in error, and Joseph Anderson and Hannah M. Anderson, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein
45 was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendants in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM. F. MILLER,
Associate Justice Supreme Court of the United States.

[Endorsed:] Originals.

46 The United States of America to Levi Carkins, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein Joseph Anderson and Hannah M. Anderson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this fourteenth day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

SAM. F. MILLER,
Justice Sup. Court.

47 On this 22nd day of April, in the year of our Lord one thousand eight hundred and eighty-seven, personally appeared Jay Cherry before me, the subscriber, C. D. Taylor, a notary public within and for the county of Adams and State of Nebraska, and makes oath that he delivered a true copy of the within citation to Levi Cawkins on the 21st day of April, A. D. 1887.

JAY CHERRY.

Sworn to and subscribed the 22d day of April, A. D. 1887, by Jay Cherry.

Witness my hand and notarial seal.

[Notarial Seal, Adams County, Nebraska.]

C. D. TAYLOR,
Notary Public in and for Adams County, Nebraska.

Endorsed on cover: Nebraska supreme court. No. 322. Joseph Anderson and Hannah M. Anderson, plaintiffs in error *vs.* Levi Carkins. Filed April 28, 1887.

IN THE SUPREME CO[illegible]

OF THE

UNITED STATES.

OCTOBER TERM, 18[illegible]

JOSEPH ANDERSON and
HANNAH M. ANDERSON,
Plaintiffs in Error,

vs.

LEVI CARKINS,
Defendant in Error.

No. 322.

Brief and Argument of Plaintiffs in Error

JAMES M. WOOLWORTH,
BATTY & CASTO,
Attorneys and Proctors for Plaintiffs in Error.

[illegible]

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1889.

JOPSEPH ANDERSON and
HANNAH M. ANDERSON,
Plaintiffs in Error,
vs
LEVI CARKINS,
Defendant in Error.

No. 322.

FACTS.

A full statement of the facts in this case may be found in our former brief, filed herein on the motion of defendant in error to dismiss for want of jurisdiction.

On the question of jurisdiction, we refer the Honorable Court to our Brief already on file herein.

BRIEF AND ARGUMENT.

There are but two questions raised by the pleadings in this case:

First—Is the contract sued on by plaintiff (defendant in error), a valid contract under the act of Congress relative to homesteads on government lands, so as to entitle the defendant in error to a specific performance thereof? it being admitted by defendant in error under his demurrer (the reply going only to the question of consideration), that at the time the contract sought to be specifically enforced by defendant in error was made "the land mentioned therein belonged to the general government of the United States," and "that the said contract was made in contemplation of the defendant, Joseph Anderson, taking said land as a homestead under and by virtue of the acts of Congress, granting homestead upon the public domain," and "that no entry had been made thereon by either of the defendants at that time, and not for some time subsequent thereto;" and that as soon as the defendants, plaintiffs in error, "learned that said contract was contrary to law, they took steps to and did repudiate said contract and held the same as void, and have so treated the same ever since."

Second—Was there a consideration for the defendants, plaintiffs in error, making said contract? This second question

cannot exist at all only after the first question has been passed upon and decided in the affirmative, because, no matter how valuable the consideration, if the contract were invalid under said acts of congress, it could not be specifically enforced.

The errors relied upon in this case are that a question has arisen between the parties hereto upon the right of the plaintiffs in error (defendants below) to plead and have the protection as against the claim of defendant in error (plaintiff below) of the provisions of the homestead laws of the United States, and that the judgment rendered by the Supreme Court of Nebraska is against that right.

On the first question raised by the pleadings we submit the following: The law under and by virture of which the plaintiff in error, Joseph Anderson, filed his homestead entry upon the quarter section of land described in his answer, and of which the land described in the contract sued on is a part, is chapter five (5) of the Revised Statutes of the United States of 1878, second addition, more particularly sections 2289, 2290, 2291 and 2304 of said chapter.

Section 2289 provides who are entitled to homesteads. Section 2290 reads as follows: "The person applying for the benefit of preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, AND THAT SUCH APPLICATION IS MADE FOR HIS EXCLUSIVE USE AND BENEFIT, AND THAT HIS

ENTRY IS MADE FOR THE PURPOSE OF ACTUAL SETTLEMENT AND CULTIVATION, AND NOT EITHER DIRECTLY OR INDIRECTLY FOR THE USE OR BENEFIT OF ANY OTHER PERSON; and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified."

Section 2291 provides for the time and manner of proving up, and among other things required before certificate issues, is that the applicant "makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight," which section provides for alienation for "church, cemetery, school purposes, or for the right-of-way of railroads."

Section 2304 makes provisions for the soldiers and officers who have served in the army of the United States during the recent rebellion, &c., and provides that "on compliance with the provisions of this chapter, as hereinafter modified, shall be entitled to enter land, &c."

The modifications following simply provide that the time served in the army shall be deducted from the time required to live upon the land before proving up, and does not in any sense modify or change sections 2290 and 2291, or either of them, only as to time before final proof. Thus it will be seen that under the pleadings in this action in passing upon the validity of the contract sued on, an interpretation and construction of this United

States statute is necessary, and consequently involves a Federal question.

Now what is the proper construction to place upon that statute?

This question, with the facts the same as the facts in this case, except the homesteader was living on the land at the time the contract was made, was up before the supreme court of Kansas, and in an able opinion rendered by His Honor Judge Brewer, it was decided that a court of equity would not decree specific performance of such a contract, because "it is so clearly against the will and policy of the government and so necessarily resting upon perjury, that a court of equity will have nothing to do with it."

Mellison vs Allen, 30 Kan., 382.

As stated in the opinion in that case, "while it is true that these sections contain no express prohibition on alienation, and no declaration of forfeiture or penalty in case of alienation, yet the homestead right cannot be perfected in case of alienation without perjury by the homesteader."

"That the homestead is a gift from the government to the homesteader, conditioned upon his occupancy for five years, and upon his making no disposition or alienation during such term," and "that the affidavit of non-alienation is as clear an expression of the legislative intent as a direct prohibition," and "that the policy of the government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expira-

tion of the five years;" and "that a successful alienation could be accomplished only by perjury;" and "that an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation and thus deprive the purchaser of any possibility of acquiring title to the land;" and "that a contract whose consummation necessarily rests on perjury is illegal;" and "that both purchaser and vendor are parties to the wrong, and that courts refuse to enforce such contracts, not from any regard to the vendor but from motives of public policy;" and "that courts of equity have always exercised a discretion in enforcing the specific performance of contracts to convey, and that it would be strange, indeed, if a court of equity lent its aid to enforce the performance of a contract founded upon perjury, and entered into in defiance of clearly expressed will of the government."

The case of Brake vs. Ballou, 19 Kan., 397, is cited.

In this last case the question was: will a court of equity compel the specific performance of a verbal contract to convey an interest in land, the title to which, at the time of the contract, was in the general government, and which the defendant intended to purchase from the government under the act of Congress of July 15, 1870? which provided "that said lands" (Osage Diminished Reserve) shall be open to settlement * * * * and shall be sold to ACTUAL SETTLERS ONLY."

The court say: "Under this statute no one but actual settlers could purchase any of said land, and he could not purchase more than 160 acres;" and that "there is no pretense that the plaintiff was ever an actual settler at all on the land in contro-

versy. Therefore, he had no right himself to purchase said land from the government, and to procure any other person to purchase it for him would be a fraud upon the government. If he could obtain title to lands in that way it would be to cause the government to sell its lands to others than actual settlers in violation of its own laws. In this way an individual might procure thousands of acres of lands, &c."

In the above case of Mellison vs. Allen, the court say: "It is true the contract in this case was in writing, but we cannot think this fact gives a party a higher standing in a court of equity."

This is well said. If a contract is void because of being in contravention of an existing law, it matters not whether the contract be in writing or verbal; neither is legal.

Neither of the above cases is as strong as the one at bar. In the first, the entry had been made before the contract sued on. In the second, there were no such strong provisions in the law governing the land in question as are found in sections 2290 and 2291 of the Homestead Laws.

The Supreme Court of Nebraska in Dawson vs. Merrill, 2 Neb., 119, pronounced against the validity of such a contract as the one sued on, and in a case, too, where the facts were almost the same as in the case at bar, the only difference being, that in that case the original entry had been made at the time the contract sued on was entered into, and consequently the entryman could make the first affidavit as provided in section 2290, without

perjury, and just why the same court should take a different view in this case is not clear. The only solution we can make is that the court made the wrong application of the statute of the State of Nebraska as pointed out in our former brief.

In Oaks vs. Heaton, 44 Iowa, 116, the plaintiff had a pre-emption right to a quarter section of land in Iowa, and entered into contract with the defendant that he, plaintiff, would relinquish his claim, and defendant homestead the quarter, and upon final proof, convey the west half to plaintiff in consideration thereof.

The plaintiff had never surrendered possession of the said west half, and was in possession thereof at the time suit was commenced. The contract was dated July 5, 1870. On August 17, 1870, defendants executed and delivered to plaintiff a special warranty deed to the said west half. On November 18, 1872, the defendant proved up on said quarter section and then refused to convey to plaintiff. That on January 13, 1873, defendant (Heaton) gave defendant (Day) a warranty deed to said quarter section, and Day gave Heaton a mortgage back.

Plaintiff prays to have said deed and mortgage set aside, and Defendant Heaton ordered to convey said west half to plaintiff, defendant's answer setting up the Homestead Laws as a defense.

The court say: "The sole question in this case is, 'can an occupant of land, under the homestead act of 1862, make a valid contract to convey his homestead when he shall have acquired

the legal title?'" and reversed the decree of the inferior court which held that the contract was valid and that the plaintiff was entitled to the relief prayed.

That case is squarely in point, and holds that a court of equity will not enforce a contract, the validity of which depended upon perjury.

The court say in that case that "it is conclusively presumed that the plaintiff knew of the provisions of this law (homestead law)." "That he had placed defendant in a position which rendered it necessary for him to perjure himself before he could obtain patent to the land."

In the case of Close vs. Stuyvesant, lately decided by the Supreme Court of Illinois, while they do not pass squarely upon this question, yet they discuss the validity of such a contract at length and clearly indicate that they are against the validity of contracts of this kind. Decided January 26, 1889.

In Nichols vs. Council, decided by the Supreme Court of Arkansas, October 20, 1888, reported in S. W. Rep., Vol. 9, page 365, was an action in ejectment.

The plaintiff claimed under patent of the United States, issued to him under the homestead act. The defendant claimed under a warranty deed executed to him by one Wittich, under and by virtue of a power of attorney given by plaintiff to said Wittich, bearing date August 24, 1875, authorizing said Wittich to convey any lands of which the plaintiff (Nichols) was then, or might thereafter become seized, including any which the plaintiff

might locate under the Soldiers' Additional Homestead Act of June 8, 1872.

After executing this power of attorney, the plaintiff made original filing and subsequently proved up and got patent to the land in controversy. This case, therefore, presents the same question involved in the case at bar, only in a different form, viz.: "Is a contract to subsequently convey, or authorizing a subsequent conveyance of land, the title to which is, at the time of making the contract, in the general government, and on which the party agreeing to convey, or authorizes the conveyance, has not yet made the first filings, or the affidavit relative thereto, but on which he subsequently makes first filings and affidavit, a valid contract under the Homestead Act?"

The court in the above case say: "But it is against the policy of the United States homestead laws to permit a conveyance of any part of the homestead before the entry is completed. An agreement to convey, or a conveyance by the homesteader, is therefore void, and it is the recognized doctrine that the public interest requires that the courts shall lend their aid to carry out the policy of the statute, notwithstanding the homesteader is the plaintiff and party to an agreement looking to the violation of the law," and cites

Cox vs. Donnelly, 34 Ark., 762.

Sorrels vs. Self, 43 Ark., 451.

Sherman vs. Eakin, 47 Ark., 351.

Marshall vs. Cowles, 48 Ark., 362.

This case of Nichols vs. Council is also valuable for holding that the "Soldiers' Additional Homestead Act" does not change or modify the general "Homestead Act" relative to alienation or contracts to alienate.

The same affidavits as to the subject of alienation or agreements to alienate are required.

The question of validity of the contract sued on in the case at bar was before the Secretary of the Interior in the case of Aldrich vs. Anderson, reported in Vol. 2, Page 71, Decisions of the Department of the Interior. Aldrich contested the claim of Anderson, plaintiff in error, on the ground that Anderson had made the contract sued on, and the case was carried to the Secretary of the Interior, and in that case, Carkins, defendant in error, was a voluntary witness. The opinion of the Secretary of the Interior is as follows: "The Commissioner of the General Land Office—Sir: I have considered the case of Elisha B. Aldrich vs. Joseph Anderson on appeal by Aldrich from your decision of April 6, 1882, dismissing the contest. This case was initiated July 22, 1880, on allegations that Anderson was holding the land for speculative purposes, and had already sold one half thereof, having made a written contract therefor."

It appears that Anderson filed a Soldiers Declaratory Statement September 15, 1876, for the south-east quarter of sec. 10, town. 8, range 10 west, Bloomington, Nebraska, and made homestead entry therefor, March 7, 1877. On December 16, 1876, (as appears from the date thereof,) he signed a written contract with

one Carkins, whereby, for the consideration of $100, he agreed to make and execute to Carkins, on or before May 1, 1881, (at which date it was supposed Anderson would have acquired title to the tract,) a warranty deed for the south half of the tract. The testimony is conflicting as to whether this contract was actually made upon the day of its date or subsequently to the date of Anderson's entry, nor is this material for the purposes of this decision, because the principal to be applied will embrace either date.

The question involved is as to the effect of this contract upon Anderson's entry, and the rulings of your office and of this department have generally held that if a contract of this character could be enforced against the homstead entry, it was fatal to his claim, otherwise not.

Further consideration of the question leads me to the conclusion that such a contract, if not absolutely forbidden by statute, is hostile to the whole spirit and purpose of the homestead law, and to the public policy relative thereto and cannot be enforced.

This view is held by the court in Dawson vs. Merrille, (2 Nebraska, 119), in which they say that if the provisions of the homestead law do not directly prohibit the making of such contracts, they do most clearly indicate a policy adverse to them, and hence, that being against public policy, a court will not lend its aid to enforce them; and in Oaks vs. Heaton (44 Iowa, 116) where the question was like that in the present case, the court held that an occupier of land under the homestead law cannot

make a valid contract to convey his homestead when he shall have acquired the legal title.

If such contract is not valid it is void, and cannot be enforced against the party making it; and being without legal significance it is not the ALIENATION which the law prohibits.

The rulings in Nebraska and Iowa accord with the well settled doctrine that a contract inconsistent with public policy can not be enforced.

Coppell vs. Hall, 7 Wall, 542.

Marshall vs. R. R. Co., 16 How., 314.

Scudder vs. Andrews, 2 McLean, 464.

Leavitt vs. Palmer, 3 N. Y., 19.

I am of the opinion that a contract made prior to the acquisition of title to convey land embraced in a homestead entry after the entryman shall have acquired title, is, if not illegal, against the public policy and cannot be enforced, and that an absolute conveyance only can defeat his right, and hence that Anderson's contract to convey to Carkins a portion of the land embraced in his entry was of no legal effect, and cannot change his status upon the record.

I affirm your dicision and return the papers transmitted with your letter of June 16, 1883. Very Respectfully,

H. M. TELLER, Secretary."

Thus we find that the contract sued on in this case has al-

ready been declared invalid by one of the ablest jurists of this country.

Simmons vs. Yurann, 11 Nebraska, 518;

Bateman vs. Robinson, 12 Nebraska, 511;

Blanchard vs. Jamison, 14 Nebraska, 246,

Were cited by counsel for defendant in error in their brief in the state court, and also cited by the state court in their Opinion as having decided the issue in this case. But let us see. The first two of these cases were actions to recover back money paid by the plaintiff therein to the defendant therein upon a similar contract.

The court held that the plaintiff in each case, not being in PARI DELICTO, was entitled to recover the money so paid. But that is a very different thing from enforcing specific performance of a contract to convey the land under the facts and agreement made out by the pleadings in the case at bar.

Had defendant in error sued plaintiff in error to recover a money judgment for the amount paid to plaintiff in error by defendant in error upon the contract set forth, the case would have been similar to those cases and this case would never have been in this court.

In those cases the court has a good deal to say about the plaintiffs therein NOT being in PARI DELICTO, Now, while the plaintiff may not be in PARI DELICTO, as to his right to recover the money paid by him upon a contract of this kind, yet he certainly

is in PARI DELICTO in making a contract that he knows the other party to the contract cannot carry out without first committing the crime of perjury.

There is no law, either directly or indirectly, that a man violates in making a contract to purchase the improvements another man has upon government lands or in making a contract to make certain improvements, such as breaking upon government lands for another. But this is quite a different kind of a contract from the one sued on and the specific performance of which is asked in this action.

The rule, "IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS ET POSSIDENTIS," certainly applies, and we think that the condition of the defendant (plaintiff in error) is certainly preferable in an action to compel specific performance of a contract to convey the land itself, the title to which is in the general government at the time the contract is made and upon which the original papers have not been filed nor the original affidavit made.

We must also bear in mind the distinction between executed contracts and executory contracts, and remember that where courts sometimes permit the former to stand they will refuse to compel specific performance of the latter. This is an executory contract sought to be enforced specifically.

We desire to suggest the following on the question of jurisdiction and as to whether a Federal question is involved in addition to our former brief: Considered independently of statutory enactments, the contract would be legal and could be specifically

enforced. In other words, there is no positive law outside of the United States laws that either, directly or indirectly, prevents a man from making a contract that he will convey sometime in the future land to which he EXPECTS to obtain the title; neither would such a contract be against public policy were there no United States laws on the subject. Why such a contract is against public policy, is, because it is contrary to public policy to permit men to enter into a contract to do a thing that cannot be done without first committing a crime. The plaintiff in error, Joseph Anderson, could not have made the original affidavit required in Section 2290 of the Homestead Laws, after having entered into the contract sued on, without committing perjury, only by previously repudiating the contract, as he says in his answer he did do. There being no law, then, outside of the United States Statutes, that prevents such contracts, it becomes necessary to consider and construe the United States Statute in order to determine whether such a contract is legal or not. The policy of the Homestead Laws of the United States is to cause the western lands to be opened up for actual settlement, occupation and improvement, and to thus rescue a vast region of wild land from the howling coyote and roaming savage, and convert it into beautiful and happy homes.

If such contracts as the one sued on were valid legal contracts, syndicates would have formed in the large cities of the east and hired hoodlums, tramps and criminals to go west, settle on a township of land here, another there, another there, and so on, and stay thereon the shortest possible time, prove up, deed

to the syndicate, skip out, and leave those townships unsettled and owned by syndicates for speculative purposes, made valuable by the honest, bona fide settlement of the surrounding territory, and thus the very object, purpose and policy of the Homestead Laws would be defeated.

But enough. We ask that the judgment or decree of the Supreme Court of Nebraska, rendered herein, be reversed, the contract sued on be declared illegal and void, and that the relief asked by defendant in error, plaintiff below, be denied, and that plaintiffs in error have their costs.

JAMES M. WOOLWORTH,
BATTY & CASTO,
Attorneys for Plaintiffs in Error.

APR 30 1890
JAMES H. MCKENNEY
CLERK

In The Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM 1889.

JOSEPH ANDERSON, et ux,
Plaintiffs in Error.
vs.
LEVI CARKINS,
Defendant in Error.

No. 322.

Brief and Argument of the Defendant in Error.

A. H. BOWEN,
C. HOEPPNER,
ATTORNEYS FOR DEFENDANT IN ERROR.

In The Supreme Court,

OF THE

UNITED STATES.

OCTOBER TERM, 1889.

NO. 322.

JOSEPH ANDERSON, et ux.,
Plaintiffs in Error.

vs.

LEVI CARKINS,
Defendant in Error.

STATEMENT OF CASE.

On the 10th day of October, 1885, defendant in error, plaintiff below, filed his petition in the District Court of Adams County, Nebraska, stating that on December 16th, 1876, defendants,—plaintiff in error owning and being in possession of the South ½ of the Southeast ¼ of Section 10, Town 8 North of Range 10 West, in said county, did, on said day, sell same to plaintiff. and entered into an agreement in writing of that date, whereby, in consideration of $100, paid

by plaintiff to defendants, said defendants sold said tract of land to plaintiff, and therein agreed to execute and deliver to plaintiff on or before May 1st, 1881, a good and sufficient warranty deed to said premises, clear of all incumbrances, binding themselves, their heirs, executors, administrators, and assigns.

That said contract was in words following, to-wit:

"This agreement, made and entered into this sixteenth day of December, A. D. 1876, by and between Joseph Anderson and Hannah M. Anderson, his wife, of the County of Adams, State of Nebraska parties of the first part, and Levi Carkins, of Adams County, Nebraska, party of the second part, witnesseth that the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars, to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to-wit: The south one-half of the southeast quarter of Section ten (10), in town eight (8), Range ten (10), west, in Adams County, Nebraska, and the parties of the first part further agree with the party of the second part that they will make and execute to him, on or before the first day of May, 1881, a good and sufficient warranty deed of said premises, free of all incumbrance and for the faithful performance of this contract they hereby bind themselves, their heirs, executors, administrators and asssigns.

In witness whereof, they have hereunto set their hands and seals this sixteenth day of December, 1876.

JOSEPH ANDERSON,

(SIGNED.) HANNAH M. ANDERSON

In presence of Parties of the first part.

L. P. HAWLEY. LEVI CARKINS,

Party of the second part.

That plaintiff had performed all conditions on his part and had frequently demanded his deed from defendants, which they have heretofore and still do refuse to make.

Plaintiff prays decree requiring specific performance of said contract.

Defendants—plaintiffs in error—answered said petition alleging that when contract was made the land in controversy belonged to the General Government.

That the contract was made to enable defendants to homestead the tract which they did on March 7th, 1877, and that they resided thereon until March 31st, 1884, when they made final proof and subsequently obtained patent from the United States.

That the contract was made before the entry of said land by the defendants and before the patent issued from the United States and that the same was void as against public policy.

That the contract was without consideration.

The plaintiff—defendant in error—demurred to the answer of defendants—plaintiffs in error—except that count settling up want of consideration, to which he filed a general reply denying the same and alleging that the consideration was valuable, to-wit: The transfer by plaintiff to the defendants, property of the plaintiff, which was received by defendants and still retained by them.

That such property was worth more than $100; and upon the trial the evidence showed that plaintiff, in 1876, had what is known as a Timber Culture Entry upon the southeast quarter of section 10, town 8, range 10, upon which he had 40 acres under cultivation; 20 acres of which had been planted to and was filled with growing timber.

That the value of such improvements and timber was agreed upon by the parties to be $1,000. That plaintiff in error desired to

purchase said tract and offered defendants in error—if he would relinquish his timber claim on said tract, so that plaintiff in error could homstead the same—to make such homestead entry and comply with the law, and after final proof and patent for the same from the United States, to make deed to the south ½ of said tract to defendant in error, in payment for said improvements and such relinquishment, which offer was accepted, and the contract as heretofore stated was then and there entered into between said parties.

The trial court dismissed the petition of plaintiff, who prosecuted a writ of error and the Supreme Court of Nebraska reversed the trial court, and entered a decree of specific performance, as shown by the following opinion of such court:

MAXWELL, C. J. In October, 1885, the plaintiff filed a petition in the court below, stating that on December 16th, 1876, defendants owning and being in possession of the south ½ of the south east ¼ of Section 10, Township 8, Range 10, did on said day sell same to plaintiff and entered into an agreement in writing of that date, whereby, in consideration of $100.00 paid by plaintiff to defendants, said defendants sold said tract of land to plaintiff, and therein agreed to execute and deliver to plaintiff, on or before May 1st., 1881, a good and sufficient warranty deed to said premises, clear of all incumbrance, binding themselves, their heirs, executors, administrators, and assigns; that plaintiff has performed all conditions on his part, that he has frequently demanded of defendants the fulfillment of said contract, and the execution of said deed of conveyance, which they have ever and still refuse to make. Plaintiff prays for decree requiring specific performance, and for such other relief as he may be entitled to.

The following is the contract upon which the action is brought.

"This agreement made and entered into this sixteenth day of December, A. D. 1876, by and between Joseph Anderson and Hannah Anderson, his wife, of the county of Adams, and State of Neb-

raska, parties of the first part, and Levi Carkins, of Adams county, Nebraska, party of the second part, witnesseth that the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars, to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real estate, to-wit: the south one-half of southeast quarter of section ten, (10), in township eight, (8), range ten, (10), west in Adams county, Nebraska. And the parties of the first part further agree with the party of the second part that they will make and execute to him, on or before the first day of May, 1881, a good and sufficient warranty deed of said premises, clear of all incumbrance, and for the faithful performance of this contract they hereby bind themselves, their heirs, executors, administrators and assigns.

"In witness whereof they have hereunto set their hands and seals this sixteenth day of December, 1876."

JOSEPH ANDERSON,
HANNAH M. ANDERSON,
Parties of the first part.

"In presence of L. P. Hawley."

LEVI CARKINS,
Party of the second part.

The defendants filed an answer as follows: Denying that when contract was made that they were owners or in possession of said tract of land, and alleging that, when contract was made, the land belonging to general government; that contract was made to homestead tract under acts of Congress. In March, 1877, Joseph Anderson, defendant, entered tract with other land, as a homestead, and resided on and cultivated land until March 31, 1884, when he made final proof at land-office, and subsequently received patent for tract; that when he made contract, he was ignorant and unacquainted with law governing homestead; that plaintiff, seeking to cheat and defraud defendants out of their rights, pretended that he had a

claim on land, and represented that, if defendants would make contract, he would convey his right to them; defendant was thereby induced to make contract: that as soon as defendants learned contract was contrary to law, they repudiated the same, and have ever since treated same as null and void; that no consideration was paid for sale of land; that contract is void as against public policy. Plaintiff filed his reply denying that said contract was without consideration, and alleging that the consideration was valuable, to-wit, the transfer by plaintiff of property to defendants which was received by defendants, and is still retained by them; that such property was worth more than $100. There was a trial to the court, and judgement rendered against the plaintiff dismissing the action.

The testimony shows that in 1874 the plaintiff was possessed of a timber claim of 160 acres on government land, and had broken up 40 acres of said land; that in 1875 he set out about 20 acres of timber thereon; that in 1876 the plaintiff sold the claim in controversy to the defendant Anderson, who was to enter the same as a homestead, under the laws of the United States, and who, after making final proof, was to convey one-half of said land to the plaintiff.

Chapter 38 of the Compiled Statutes of Nebraska, provides that "All contracts, promises, assumpsits or undertakings, either written or verbal, which shall be made hereafter in good faith, and without fraud, collusionx or circumvention, for sale, purchase or payments of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or in equity, and may be sued for and recovered as in other contracts." Section 2: "All deeds of quit claim or other conveyance of all improvements upon public lands shall be as binding and effectual in law and equity, between the parties, for conveying of the title of the grantor in and to the same, as in cases where the grantor has the fee simple to the premises."

This statute was in force when this contract was made, and authorized recovery for improvements on the public lands. The defendants now refuse to execute the contract upon the ground that it is against public policy, and therefore void. This question was before the court in Simmons vs. Yurann, 11 Neb., 516, 9 N. W. Rep., 690; Bateman vs. Robinson, 12 Neb., 511, 11 N. W. Rep., 736. In this case there was re-argument ordered, and the authorities fully examined and cited, and it was held, in substance, that where acts are merely prohibited by statute, and the parties are not *in pari-delicto*, the party upon whom no penalty is imposed may, upon non-performance, enforce his contract against his co contractor. Jacques vs. Golightly, 2 W. Bl., 1073; Browning vs. Morris, 2 Cowp., 790; Williams vs. Hedly, 8 East, 378; Inhabitants of Worcester vs. Eaton, 11 Mass., 368; White vs. Franklin Bank, 22 Pick., 181; Lowell vs. Boston & L. R. Co., 23 Pick., 24; Schermerhorn vs. Talman, 14 N. Y., 93; Blanchard vs. Jamison, 14 Neb., 246, 15 N. W. Rep., 212. This principle is recognized by the Supreme Court of the United States, and it has been held, in a number of cases, that when an illegal contract is compelled and money or property has been received by a joint owner by force of the illegal contract he will not be permitted to retain the whole by setting up the illegality of the transaction by which he procured it, but must account to his associates. McBlair vs. Gibbs, 17 Howard, 237; Brooks vs. Martin, 2 Wall., 70, and cases cited; Wann v. Kelley, 2 McCrary, 628; Planters' Bank v. Union Bank, 16 Wall., 483.

In this case timber claim and improvements are shown by the testimony to have been worth about one thousand dollars. This the defendant obtained under his promise to convey one-half of the land to plaintiff. The defend ant's title to the land is the result of the entire transaction, and he cannot be permitted to retain the entire results upon the sole grounds that the means by which he obtained the same was unlawful. The case of Dawson v. Merille, 2 Neb., 119, is the only case sighted by the defendant in support of his

claim, and this case is practically overruled in Simmons v. Yuran, 11 Neb., 518; Bateman v. Robinson, 12 Neb., 511, and Blanchard v. Jamison, 14 Neb., 246.

We hold, therefore, that the plaintiff is entitled to the performance of the contract. The judgment of the District Court is reversed, and a decree of specific performance will be entered in this Court.

Decree accordingly.

The other judges concur.

At the October, 1887, term of this Court, to-wit, on the 12th day of December, 1887, defendant in error filed a motion to dismiss the above action, upon the following grounds:

1st.

That the Court is without jurisdiction to review the judgment contained in the record brought up in this cause, there being no Federal question presented therein.

2nd.

That the decision of the Court below is based solely upon a statute of the state of Nebraska, which is not repugnant, nor claimed to be repugnant to the Constitution of the United States; which motion, as we understand it, the Court refused to pass upon until the case was argued in chief before the Court.

To sustain said motion, defendant in error presented to the Court the following

POINTS:

The decision of the State Court is based solely upon Chapter 38 of the Compiled Statutes of Nebraska, which reads as follows:

"SECTION 1. All contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion or circumvention, for the sale, pur-

chase, or payment of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or equity, and may be sued for and recovered as in other contracts.

"SECTION 2. All deeds of quit-claim or other conveyance, of all improvements upon public lands, shall be as binding and effectual in law and equity between the parties for conveying of the title of the grantor in and to the same, as in cases where the grantor has the fee simple to the premises."

Compiled Statutes, Nebraska. 376, Title, "Improvements on Public Lands."

To vest this Court with jurisdiction to review the decision of the State Court in this case, it must appear from the record that the decision of the State Court was in conflict with the Constitution or that the validity of a statute of the United States was necessarily involved, and that such statute must have been raised and presented to the State Court, and that it must have been decided by the State Court against the right claimed or asserted by plaintiff in error; and further, that such decision was necessary to the judgment or decree rendered in this case.

Rev. Stat., U. S., Sec. 709.

Railroad Co. vs. Rock, 4 Wallace, 177.

Brown vs. Atwell, 92 U. S., 327.

Steines vs. Franklin Co., 14 Wallace, 20.

Brown vs. Colorado, 106 U. S., 95.

Detroit City Railway vs. Guthard, 114 U. S., 133.

II.

And it must appear by the record that such Federal question was raised and decided by the State Court.

Insurance Co. vs. The Treasurer, 11 Wall, 204.

Cockroft vs. Rose, 14 Ib., 5.

Sevier vs. Haskell, Ib., 13.

Steines vs Franklin Co., Ib., 21.

Rector vs. Ashley, 6 Ib., 147.

Hamilton Co. vs. Massachusetts, Ib., 636.
Smith vs. Adsit, 16 Ib., 188.
Same vs. Same, 23 Ib. 373.
Crowell, vs. Randall, 10 Peters, 368.
Parmalee, vs. Lawrence, 11 Wall., 36.
Moore vs. Mississippi, 21 Ib., 636.
Murdock vs. Memphis, 20 Ib., 590.

And in this last case the Court says:

"In construing the act of 1867 with the act of 1789, the Court declares itself to be of the opinion that it is not so closely restricted to the face of the record in determining whether one of the questions mentioned in it has been decided in the State Court, and that it may under this statute, look to the properly certified opinion of the courts, when any has been delivered in the case."

Murdock vs. Memphis, 20 Wall., 7 sub-div. of syllabi 591.

III.

Though a Federal question may have arisen, if the decision of the State Court was based upon a statute of the State, and that statute is broad enough to sustain such decision and judgment, this Court will not entertain jurisdiction of the case.

Rector vs. Ashley, 6 Wall., 142.
Kennebec R. R. vs. Portland R. R., 14 Ib., 26.
Klinger vs. Missouri, 13 Ib., 257.
Bank vs. Rochester, 15 Ib., 639.
Smith vs. Adsit, 16 Ib., 188.
Same vs. Same, 23 Ib., 373.
Murdock vs. Memphis, 20 Ib., 636.
Jenkins vs. Lowenthal, 110 U. S., 222.
Adams Co., vs. Burlington Ry., 112 Ib., 123.
Hale vs. Akers, 132 U. S. 554.

IV.

And it is not enough that this Court may see that a Federal question ought to have been decided, unless it further appears that

such question was decided by the State Court.

Coons vs. Gallagher, 15 Peters, 18.

The Victory, 6 Wall., 384.

Maxwell vs. Newbold, 18 How., 517.

Crowell vs. Randall, 10 Peters, 368.

Railroad Co. vs. Rock., 4 Wall., 177.

V.

There is no Federal question raised by the pleadings in this case.

By a careful analysis of the answer of plaintiff in error filed in the trial court, as found on p. p. 4 and 5 of the printed record, being the second paragraph of the first defense, that all that is claimed therein is, that plaintiff (defendent in error) "ought not to recover on said contract because the same was made before the entry of said land by the defendant Joseph Anderson, and before the patent was issued therefor, *and the same is void as against public policy.*"

It is nownere alleged in the answer or elsewhere that the contract sued on is in conflict with any statute of the United States. All that precedes what we have quoted above is merely historical of the case, and a prelude to the defence, that the contract is void as against public policy. This being true, the motion to dismiss should be sustained for the reason that this Court has repeatedly decided that when a decision by the highest court of a state upon the general principle by which courts determine that a transaction is good or bad on principles of public policy, the decision is one that this Court is not authorized to review.

Delmas vs. Insurance Co., 14 Wal., 666.

Tarver vs. Keach, 12 Ib., 68.

BRIEF AND ARGUMENT IN MAIN CASE.

We are brought now to the argument of the main case, which is, did the Supreme Court of Nebraska err in holding that the defendant in error was entitled to the performance of the contract signed by plaintiffs in error? And in discussing this proposition, we necessarily are compelled to go over a part of the ground at least, which we have gone over in the argument of the motion to dismiss.

The decision of the Supreme Court of Nebraska, as shown by the certified opinion in the case, as found on pages 20, 21 and 22 of the printed record, shows that the decision is based upon chapter 38 of the Compiled Statutes of Nebraska, which reads as follows:

"SECTION 1. (Sale of Improvements). All contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith, and without fraud, collusion or circumvention, for sale, purchase or payment of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or equity, and may be sued for and recovered as in other contracts.

SECTION 2. (Deeds). All deeds of quit claim, or other conveyance, of all improvements upon public lands, shall be as binding and effectual in law and equity between the parties for, conveying the title of the grantor in and to the same, as in cases where the grantor has the fee simple to the premises."

As is stated in the opinion of the Supreme Court of Nebraska, this statute was in force when this contract was made, and authorized recovery for improvements on public lands, and has been before the Supreme Court of Nebraska a number of times, as will be hereinafter shown, and they have invariably decided that where acts are merely prohibited by statute, and the parties are not *in pari delicto*, the party upon whom no penalty is impoaed, may, upon non performance, enforce his contract against his co-contractor.

Simmons vs. Yuran, 11 Neb., 518.

Bateman vs. Robinson, 12 Neb., 511.

Blanchard vs. Jamison, 14 Neb., 246.

Now, the statute, granting homesteads upon the public domain, being Section 2291 of the Revised Statutes of the United States, reads as follows:

"SEC. 2291. No certificate, however shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, her heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. (That the proof of residence, occupation, or cultivation, the affidavit of non-alienation, and the oath of allegiance, required to be made by section twenty-two hundred and ninety-one of the Revised Statutes, may be made before the judge, or, in his absence, before the clerk of any court of record of the county and State, or district and Territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said State or Territory; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and receiver, with the fee and charges allowed by law to

him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same. That if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being wilful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register.)

It will be observed by the language of this Statute, that there is but an implied prohibition on the part of the homesteader, against his selling or disposing of his homestead or any part thereof, and no prohibition whatever as against the party purchasing. It will be observed that the only prohibition, even by implication, is that part of the section which provides that on the proving up by the homesteader, after the expiration of the time required by him to live upon the land, he is required to prove by two credible witnesses that no part of such land has been alienated, etc.

This Statute was passed on the 20th of May, 1862, and a very great difference will be observed between this Statute and the act of 4th September, 1841, being section 2262 of the Revised Statutes, entitled "Pre-emptions." This latter Statute reads as follows:

"SEC. 2262. Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land-district in which the land is situated that he has never had the benefit of any right of pre-emption under section twenty-two hundred and fifty-nine: that he is not the owner of three hundred and twenty acres of land in any State or Territory; that he has not settled upon and improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the

benefit of any person except himself; and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and eighty-eight. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land-office of such district, and to transmit a duplicate copy to the General Land-Office, either of which shall be good and sufficient evidence that such oath was administered according to law."

This latter Statute, it will be observed, absolutely prohibits, not only the person from selling his pre-emption, under the penalties therein stated, but also prohibits, under equally heavy penalties, any person fron purchasing the same. In the latter case, there is no question but what both purchaser and seller would be *in pari delicto*, but in the case of the homestead there is nothing in the Statute, either in express terms, or by implication, that prohibits a purchase, and the parties in such case would not be *in pari delicto*.

While we recognize the rule that a *particeps criminis* cannot invoke the aid of the Court, still the rule does not apply in all cases. If the party seeking relief, although *particeps criminis*, yet is not *in pari delicto*, the rule does not apply, as shown by the following English authorities:

Smith vs. Bromley, 2 Douglas, 696;
Jaques vs. Golightly, 2 Wm., Black. 1073;
Browning vs. Morris, 2 Cowp., 790;
Williams vs. Headley, 8 East, 378;

and the same rule is applied in the following American authorities:

Inhabitants of Worcester vs. Eaton, 11 Mass., 368;
Lowell vs. Boston &c., Railroad, 23 Pick., 24;
White vs. Franklin Bank, 22 Ib., 181;
Schermerhorn vs. Talman, 14, N. Y., 93;
Blanchard vs. Jamison, 14 Neb., 246.

In the cases of Smith vs. Bromley, and Browning vs. Morris, the doctrine as laid down by Lord Mansfield is, that where certain acts are made unlawful by statute, to protect the unwary, etc., although both parties are guilty of violating the law, yet they are not equally guilty, and that in such cases the party from whom money (property) is exacted, shall recover it back from him who practiced the oppression.

This distinction seems to have been ever afterwards observed in the English courts, and being founded on sound principle, is worthy of adoption as a principle of common law in this country.

Inhabitants of Worcester vs. Eaton, 11 Mass., 376-7.

In the case of Lowell vs. Boston &c., R. R. Co., above cited, Wilde J. speaking for the court, on page 32, says:

"Our law, however, does not in every case disallow an action, by one wrong-doer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. In respect to offences, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them although both parties are wrong-doers."

In Smith vs. Talman, 14 N.Y., at pages 123-4-5, Selden, J., in discussing this general principle, reviewed all of the cases above cited in the following language:

"There is no rule better established than that which refuses the active interposition of a court of equity in favor of one who is *particeps criminis;* but like most other rules it admits of exceptions.

There are certain cases where the party seeking relief, although *particeps criminis*, is not *in pari delicto*, to which it does not apply. This distinction seems to have been first taken by Lord Mansfield, in the case of Smith v. Bromley (2 *Doug.* 696 *note to Jones v. Barkley*). The exception was there applied only to cases where the law violated was intended to protect one of the parties from *particular acts* of oppression or extortion by the other; as for instance the statute against usury. Subsequent cases however, show that the principle is not confined to that class of cases. The next case in which the question arose was that of *Jacques v. Golightly* (2 *Wm. Bl., 1073*). The plaintiff had paid to the defendant money as a premium for insuring lottery tickets, a transaction prohibited by statute, and the action was brought to recover it back. It was insisted for the defendant, that the plaintiff being *particeps criminis*, could not recover. But the action was sustained. Blackstone, J., said it was not like the stock-jobbing act; "because there *both parties* are made *criminal, and subject to penalties.*" *Browning v. Morris* (*Cowp., 790*), was another case of the same kind. Lord Mansfield there draws the distinction between acts which are *mala in se*, such as bribery, and those which are merely prohibited by statute; and in the course of his opinion remarks that, "it is very material that the statute itself by the distinction it makes has *marked* the criminal; for the penalities are all *on one side*, upon the office-keeper." A similar question afterwards arose in the case of *Williams v. Hedley* (8 *East* 378), where it was very elaborately examined by Lord Ellenborough, who confirmed the doctrine of the previous cases. The principle of these cases is so obviously just, that no argument seems necessary to sustain it. To say that in every transaction prohibited by positive enactment the parties concerned are necessarily *in pari delicto*, would in many cases be manifestly absurd; and the test adopted by Lord Mansfield and Mr. Justice Blackstone, by which to determine the relative guilt of the parties, viz., to see upon which party *the penalty* is imposed would seem to be just.

"These cases have been several times reviewed and approved by the supreme court of Massachussetts. In the case of *Inhabitants of Worcester v. Eaton* (11 *Mass., R.*, 368), Ch. J. Parker after referring to the cases of *Smith v. Bromley* aud *Browning v Morris supra,* says: "this distinction seems to have ever been afterwards observed in the English courts, and being founded in sound principle, is worthy of adoption as a principle of common law in this count y." the same question afterwards arose in the same court, in *White v. the Franklin Bank* (22 *Pick.*, 181), and was there very fully discussed. The suit was brought to recover money which the plaintiff had deposited with the defendaut, under an agreement that it should remain for a certain specific time, in violation of an express statutory provision, which prohibited the bank from making contracts "for the payment of money at a future day certain." The action was held to lie, and the principle to the English cases to which I have referred was emphatically sustained by the unanimous opinion of the court. (*Lowell v. Boston & Lowell R. R. Co.*, 23 *Pick.*, 24; *Atlas Bank v Nahant Bank* 3 *Met.*, 581)

"It was said upon the argument, that the modern cases are opposed to this doctrine; but I am very firmly persuaded that the doctrine is sound and the distinction upon which it rests one which exists in principle and in reason. It applies no less in equity than at law, its foundation being that the parties, although joint participators in an illegal transaction, are not *equally* criminal. In the present case the penalty for violating the statute is imposed upon the *Trust Company alone.*"

The same principles have often been recognized by this court.

McBlair vs Gibbs, 17 How., 237.

Brooks vs Martin, 2 Wal., 70.

Planters Bank vs Union Bank, 16 Ib 483.

In this last case, this court by Mr. Justice Miller, on page 500 says: "The plaintiffs do not require the aid of any illegal trans-

action to establish their case. It is enough that the defendants have in their hands a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

Also in

Wann vs Kelly, 2 McCrary, 628.

By reference to the statute, (Sec. 2291) above cited, it will be observed that there is no penalty imposed upon the person who merely purchases the lands entered by another as a homestead under the laws of the United States, all the penalties, (if any) being imposed upon the person selling the same. The purchaser cannot be considered *in pari delicto* with the seller.

In reply to the argument of the Plaintiff in error, as raised in their answer in the court below, that the contract was void as being against public policy, we have this to say: Public policy is best subserved by requiring a party receiving the labor or property of another under contract to pay the price agreed upon for the same.

Simmons vs Yurann, 11 Neb. 518.
Blanchard vs Jamison, 14 Neb. 247.

If we correctly interpret Counsel for plaintiff in error, their whole argument is based upon the requirements of Section 2291 which provides for the final proof on Homesteads, and requiring the entryman to make oath that "*no part of such land has been alienated &c.,*" and that plaintiff in error could not have made such proof, without committing perjury.

By reference to the definition of the term "Alienate", we

find that it has a technical legal meaning; and any transfer of real estate short of a conveyance of the title is not an alienation of the estate. No matter in what form the sale may be made, unless the title to the estate is conveyed to the purchaser the estate is not alienated.

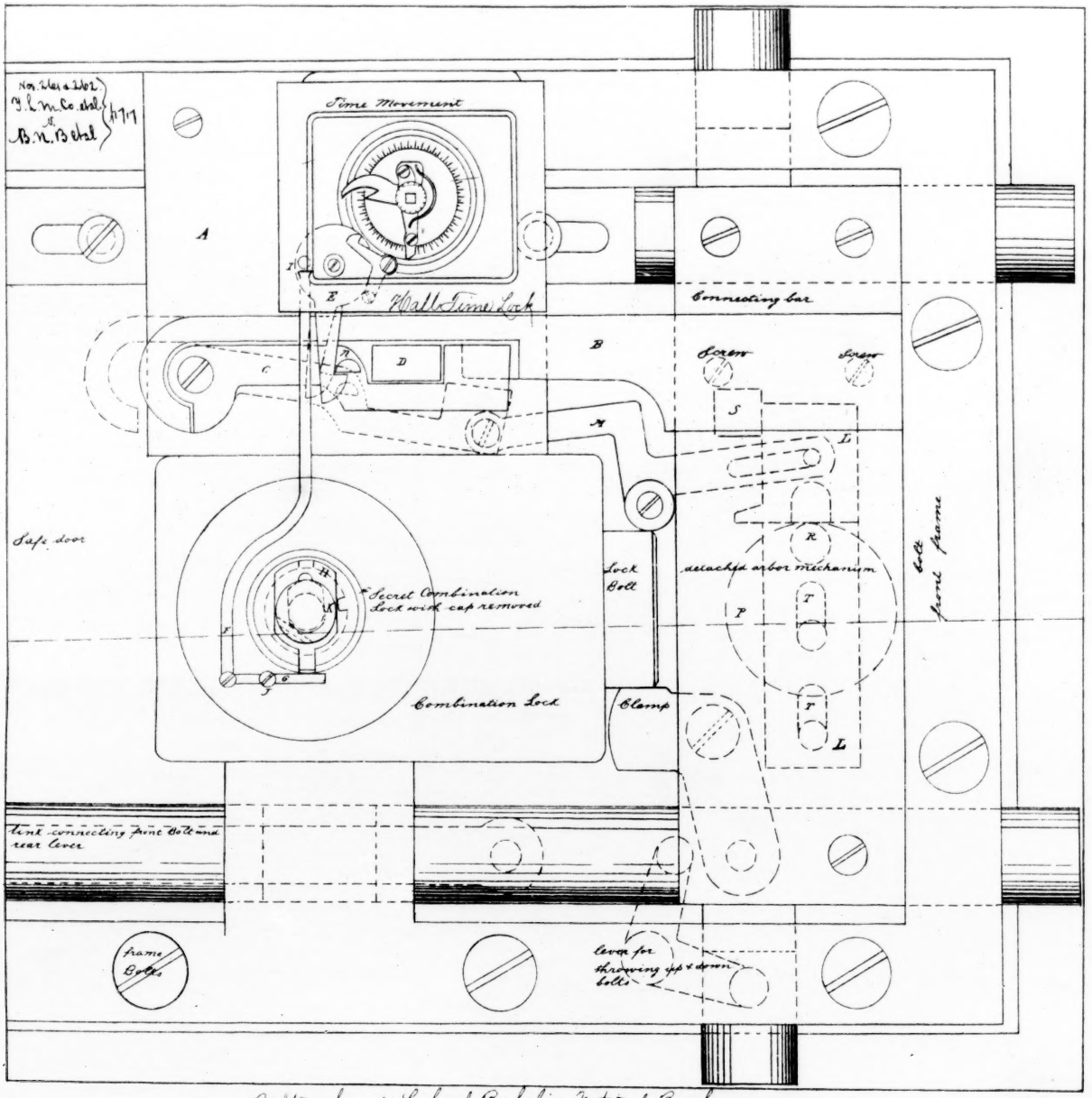
I Am. & Eng. Ency., of Law, 466;
Masters vs. Ins. Co., 11 Barb., 629;
Burbank vs. Ins. Co., 24 N. H., 558;
1 Wash. Real Prop., (3rd. Ed.) 67, *et seq.*

And with this definition, it will not be contended that there had been an alienation, but merely a contract to alienate, upon which contract this action is based.

Respectfully submitted.

A. H. BOWEN & C. HŒPPNER.

For Defendant in Error.



Boltwork and Locks of Berkshire National Bank